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No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

FRANCIS P. WALL, APPELLANT

v.

JOHN KEVIN DONOVAN, APPELLEE

ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION TWO

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the system of military retirement benefits established by the Congress, preempts the State of California from treating Air Force retirement pay as community property division upon divorce.

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JURISDICTION

The California Court of Appeal entered its judgment on December 11, 1980. The Court of Appeal denied Appellant's petition for rehearing on January 9, 1981. A notice of appeal to this court was duly filed in the California Court of Appeal on March 6, 1981.

This appeal is being docketed within 90 days of the Court of Appeal's denial of Appellant's petition for rehearing.

Appellant argued below that a question of fact exists whether Appellee had caused injury to Appellant by having Appellant stipulate that his Air Force retirement pay was community property subject to division under § 4803 of the California Civil Code, when in fact said statute, as applied to federal military pensions, is repugnant to federal statutes and invalid under the U.S. Constitution. The California courts upheld the application of this statute to federal military pensions, and entered summary judgment against Appellant.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(2). Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following statutes:

10 U.S.C. §§ 672(a)(1) 8929, 8991

11 U.S.C. § 523(a)(5)

42 U.S.C. §§ 659(a), 662(c)

California Civil Code § 4803

These statutes, along with Article VI, clause 2 of the United States Constitution, appear in Appendix E .

STATEMENT OF THE CASE

This matter involves a claim of malpractice brought by Appellant against his former attorney, the Appellee. Appellant's cause of action arose out of the divorce action between Appellant and his former wife. The relevant facts which show that Appellant suffered damages by reason of Appellee's failure to contest the superior court's jurisdiction over Appellee's federal military retirement pay, may be fairly summarized as follows:

(1) On June 29, 1972, Appellant's former wife filed a petition for legal separation in the Marin County Superior Court for the State of California, not alleging <u>any</u> residence, and requesting,

inter alia, that the court award her under § 4803 of the California Civil Code, a "quasi-community property" interest in Appellant's Air Force retirement pay.

(2) On September 5, 1972, upon the advice of Appellee, who was then his attorney of record, Appellant filed a response requesting that the marriage of the parties be dissolved. In this response, Appellee caused Appellant to allege that he was a resident of the State of California, and that the allegations set forth in his wife's petition regarding the property of the parties, was "correct". One such allegation was that Appellant's federal military retirement pay was "quasi-community property".

(3) On November 29, 1972, the superior court granted an interlocutory judgment of dissolution which, inter alia, awarded by stipulation Appellant's former wife approximately one-half of Appellant's military retirement benefits. The final judgment of dissolution was entered on March 19, 1973.

(4) In September 1973, Appellant discovered for the first time that under the law of the State of California, he had

not been a domiciliary of the State of California at the time he filed his response, and therefore, his federal military retirement pay was not subject to the provisions of § 4803 of the California Civil Code. Appellant also discovered that Appellee could have, and failed, to raise as an issue that under the supremacy clause, § 4803 cannot be applied to federal military retirement pay.

(5) Accordingly, Appellant immediately filed a motion pursuant to § 473 of the California Code of Civil Procedure to set aside the property division portions of the final judgment. On October 4, 1973, the Marin County Superior Court denied Appellant's motion on the grounds that the motion was untimely, and that there existed no reasonable likelihood that Appellant would prevail on the merits because it appeared that "at all times relevant" Appellant was a domiciliary of California, and that even if Appellant was not a domiciliary of California, he was estopped from raising the issue of domicile because he had invoked, and consented to the exercise of jurisdiction when he filed his response. Appellant did not appeal from

this decision because it would have been affirmed on the timeliness issue alone and (which result would also have been attributable to the negligence of Appellee).

(6) On June 17, 1974, Appellant filed a complaint for damages against Appellee, his former attorney, in the San Francisco Superior Court. Appellant contended that Appellee was negligent in failing to contest the issue of domicile and in failing to raise the defense that federal law and the supremacy clause of the U.S. Constitution preempted the State of California from disposing of Appellant's Air Force retirement pay. Appellant further alleged he was damaged because approximately one-half of his retirement pay was awarded to his former wife in the divorce proceeding. Said complaint was amended on March 17, 1975, and Appellee answered the Amended Complaint on April 7, 1975.

(7) On September 7, 1977 Appellee filed a motion for summary judgment contending that Appellant was collaterally estopped to raise the issue of domicile because of the decision made by the Marin County Superior Court denying Appellant's motion to set aside the judgment of divorce. Appellee contended that since Appellant

could not contest the issue of domicile, he had not suffered any damages because under California law, federal military pensions are subject to division upon the divorce of the former service person and his or her spouse. Appellant opposed the motion contending that the doctrine of collateral estoppel was not applicable in this situation and, even if Appellant was deemed to be a domicile of California, his federal military pension had not been subject to the jurisdiction of the superior court because of the doctrine of federal preemption. Nevertheless, on October 14, 1977, the trial court granted Appellee's motion for summary judgment and dismissed Appellant's complaint for malpractice.

(8) In the Court of Appeal, Appellant argued that the supremacy clause of the federal Constitution preempted the California court from dividing military retirement pay in a state divorce proceeding.[1/]

1/ Appellant also argued that the doctrine of collateral estoppel was inapplicable but the Court of Appeal's decision denying Appellant's contention on this point is not being appealed to this Court.

Citing Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979), he argued that applying the quasi-community property scheme of California, Civil Code § 4803, to Air Force retirement pay would impermissibly interfere with the military retirement system established by the Congress. Although Hisquierdo related to the retirement formula established under the Railroad retirement Act, 45 U.S.C. § 231 et seq, its reasoning and the authorities on which it applied with equal force to federal military retirement pay.

(9) Additionally, pursuant to order dated October 14, 1980 permitting the filing of Supplemental Memorandum in lieu of oral argument, Appellant sought to strengthen his argument that a question of fact existed whether or not federal preemption prevented the California court from asserting its jurisdiction over federal military retirement pay by noting that this Court had granted a hearing in McCarty v. McCarty, No. 80-5.

(10) In addition to denying Appellant's contention with regard to the issue of collateral estoppel, the Court of Appeal held that regardless of the status of

Appellant's retirement pay at the time of the divorce proceeding in 1972, since that time the courts of California have "uniformly held" (App. A, infra., at page 40 of the opinion) that vested federal military pensions are community property, and therefore, it cannot be said that Appellant has suffered any injury by reason of Appellee's conduct.

(11) Finally, in a footnote (App. A, infra., footnote 5, pages 41 and 42) the Court of Appeal disposed of Appellant's arguments concerning Hisquierdo and McCarty by stating "McCarty is not apposite here, as it did not involve a conflict between state and federal law as to husband's military pension" and that Hisquierdo does not overrule In re Marriage of Fithian, 10 Cal.3d 592 (1974) which holds that federal military retirement pay is subject to California's community property law.

(12) In his petition for rehearing, Appellant argued that the Court of Appeal had misconstrued the issues on appeal in McCarty, and further noted that in Milhan v. Milhan, No. 80-578, a petition for certiorari was pending also involving the issue of California's right to assert jurisdiction over federal military pensions in

divorce proceedings. Appellant requested that the Court of Appeal reserve jurisdiction to grant a rehearing pending a decision by this Court in McCarty and Milhan. The Court of Appeal denied Appellant's petition without opinion.

THE QUESTION IS SUBSTANTIAL

The question warrants plenary consideration for the following reasons:

1. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE SUPREME COURTS OF ALASKA AND TEXAS, AS WELL AS WITH DECISIONS OF OTHER STATE COURTS.

Following this Court's decision in Hisquierdo, the Supreme Court of Alaska held that the supremacy clause of the U.S. Constitution prohibits the states from dividing military retirement benefits upon divorce. Cose v. Cose, 592 P.2d 1230, 1232 (Alaska 1979), Cert. petition docketed, 48 U.S.L.W. 3627 (U.S. March 19, 1980) (No. 79-1469). Similarly, the Texas Supreme Court held in Ex parte Johnson, 591 S.W.2d 453 (Texas 1979), that under Hisquierdo, veterans benefits are not subject to division upon divorce.

The highest of courts of other states, however, have read Hisquierdo as allowing the division of military retirement pay pursuant to a divorce:

- Montana: Miller v. Miller, ____ Mont. ____, 609 P.2d 1185 (1980).
- Arizona: Czarnecki v. Czarnecki, 123 Ariz. 466, 600 P.2d 1098 (1979).
- California: In re Marriage of Milhan (Milhan II), 27 Cal.3d 765, 166 Cal.Rptr. 533, 613 P.2d 812 (1980). (Petition for Writ of Certiorari now pending.)

State appellate courts are split on whether Hisquierdo applies to military retirement pay.[2/] This clash of authorities perpetuates the uncertainties which existed prior to Hisquierdo--uncertainties

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2/ Compare Perez v. Perez, 587 S.W.2d 671 (Texas 1979) (treating military readjustment benefits as separate property in order to comport with the objectives of Congress), to Musser v. Musser, 70 Ill.App.3d 706, 388 N.E.2d 1289 (4th Dist. 1979), and Swope v. Mitchell, 324 So. 2d 461 (La. App., 1975) (dividing military retirement pay).

created by the state courts' inconsistent decisions on the divisibility of military retirement pay.[3/]

This split among the states is particularly important because of the frequency with which military personnel are transferred. The split encourages forum shopping since the military spouse's retirement benefits are secure in some states but not in others. The states have reached

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3/ The highest courts of Colorado and Arkansas refused to permit the division of military retirement pay in divorce actions. Ellis v. Ellis, 191 Colo. 317, 552 P.2d 506 (1976); Fenney v. Fenney, 259 Ark. 858, 537 S.W.2d 367 (1976). But other state courts reached opposite results prior to Hisquierdo. Fithian v. Fithian, 10 Cal. 3d 592, 111 Cal.Rptr. 369, 517 P.2d 449 cert. denied, 419 U.S. 825 (1974); Ramsey v. Ramsey, 96 Idaho 672, 535 P.2d 53 (1975); Chisnell v. Chisnell, 82 Mich.App. 699, 267 N.W.2d 155 (1978), cert. denied, 442 U.S. 940 (1979); Kruger v. Kruger, 73 N.J. 464, 375 A.2d 659 (1977); LeClert v. LeClert, 80 N.M. 235, 453 P.2d 755 (1969); Busby v. Busby, 457 S.W.2d 551 (Texas 1970); Wilder v. Wilder, 85 Wash.2d 364, 534 P.2d 1355 (1975). See also Bodenhorn v. Bodenhorn, 567 F.2d 629 (5th Cir. 1978) (applying Canal Zone law).

conflicting conclusions on an important question of federal law. There is a strong federal interest in the uniform interpretation of the Acts of Congress dealing with federal military retirement pay.

2. THE QUESTION IS IMPORTANT

The issue presented in this case is merely another aspect of the general question of whether federal law permits the state to divide federal military pensions in a divorce proceeding. If this Court decides in McCarty that there exist policy reasons extending to military retirement benefits which are similar to the policy considerations found by this Court in Hisquierdo, clearly the Appellant suffered injury when the Appellee failed to raise the issue of federal preemption. Equally clearly the trial court erred when it granted summary judgment to Appellee on the grounds that Appellant is unable to show damages.

The United States Air Force is all volunteer. One major inducement for enlistment and reenlistment is retirement pay. It is no small matter for Air Force recruiters to persuade enlisted persons with many years' service to continue in the

Air Force when such servicemen may lose much of their retirement pay in the event of divorce in those states which do not apply Hisquierdo to military retirement benefits.[4/]

Servicemen may well refuse to be transferred to community property states

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4/ The matter is made worse by federal law restrictions which reduce retirement pay if the military retiree takes on a federal civilian job:

> "5 U.S.C. § 5532(b): A retired officer of a regular component of a uniformed service who holds a position is entitled to receive the full pay of the position, but during the period for which he receives pay, his retired or retirement pay shall be reduced to an annual rate equal to the first $2,000 of the retired or retirement pay plus one-half of the remainder, if any. In the operation of the formula for the reduction of retired or retirement pay under this subsection, the amount of $2,000 shall be increased, from time to time, by appropriate percentage, in direct proportion to each increase in retired or retirement pay under section 1401a(b) of Title 10 to reflect changes in the Consumer Price Index."

After subtracting from his already-reduced retirement pay that portion allocated to his ex-spouse under community property systems, the retired serviceman would be left with very little indeed.

that apportion military retirement pay; by contrast, the Air Force may find that many long term enlistees favor being transferred to Alaska and Texas, where military retirement benefits are protected.

The ex-serviceman's retired pay may represent the largest single asset of the marriage. For this reason the issue may assume paramount importance in many military divorced and unduly influence decisions concerning divorce, continued military life, voluntary transfer from base to base, and divorce settlement negotiations.

The serviceman may alter his decisions to participate in congressionally funded annuity programs to benefit the spouse and children if he believes that military retirement pay is not protected against division in the event of divorce. The Congress has established several annuity programs, financed by voluntary deductions from the serviceman's pay, by which the serviceman may gain added benefits at the time of his retirement. Among these are the Retired Serviceman's Family Protection Plan, 10 U.S.C. §§ 1431-46, and the Armed Forces Survivor Benefit Plan, 10 U.S.C. §§ 1447-55. The comprehensive scheme

contemplated by the Congress by means of these enactments becomes confused and the serviceman cannot make an intelligent judgment if he is not certain as to how his basic retirement pay will fit in with the annuity program in light of the unsettled status of military retirement pay in the post-Hisquierdo era.

Because of the thousands of divorces that will continue to be affected annually, the issue is of substantial importance and warrants plenary consideration by this Court.

3. THE APPEAL PRESENTS IMPORTANT QUESTIONS CONCERNING THE PREEMPTION BY FEDERAL INTERESTS OF STATE LAW CONCERNS IN THE AREA OF DIVORCE LAW.

The apportionment between spouses of military retirement benefits presents important issues of federal preemption of state divorce laws. Although divorce law is an area almost entirely regulated by the states, the distribution of federal remuneration is an area in which the federal government and the Congress have important concerns. Hisquierdo, 439 U.S. at 582. The established rule is that state law will

not be preempted unless Congress has "positively required by direct enactment" that state law be preempted. 439 U.S. at 581. However, in the four instances in which this Court has considered federal preemption of state community property law the Court has in each case found federal preemption.[5/]

The Congress, when it has dealt expressly with community property claims of a divorced spouse, has generally been hostile to those claims. The 1977

5/ See Hisquierdo v. Hisquierdo, supra; Wissner v. Wissner, 338 U.S. 655 (1950); Yiatchos v. Yiatchos, 376 U.S. 306 (1964); Free v. Bland, 369 U.S. 663 (1962). See also McCune v. Essig, 199 U.S. 382 (1905).

A literal reading of 10 U.S.C. § 8929 together with § 8991 indicates that the Congress expressly mandated that Air Force retirement pay is to be computed and paid to the servicemen exclusively pursuant to federal law. An examination of the congressional policies behind the literal meaning of these sections may reveal congressional preemption of state community property laws which divert the serviceman's pay to another recipient.

clarification to the Social Security Act, Pub. L. No. 95-30, 91 Stat. 159 (1977) (codified as 42 U.S.C. § 662(c)), made it clear that in a divorce proceeding the divorced spouse could not claim as a creditor under community property principles; this provision clarified the meaning and intention of the 1975 amendment, Pub. L. No. 93-647, 88 Stat. 2357 (1975) (codified at 42 U.S.C. § 659(a)). See Hisquierdo, 439 U.S. at 576-77. Under both the Retired Serviceman's Family Protection Plan, 10 U.S.C. §§ 1431-46, and the Armed Forces Survivor Benefit Plan, 10 U.S.C. §§ 1447-55, the Congress has excluded the claims of divorced spouses under state community property law.[6/]

6/ The serviceman's annuity under the Retired Serviceman's Family Protection Plan can benefit only a surviving spouse. At 10 U.S.C. §1434(c) the Congress has specified that:

> "An election of an annuity...shall provide that no deduction may be made from the elector's retired or retainer pay after the last day of the month in which there is no eligible spouse because of death or divorce"[emphasis supplied].

fn.6 cont'd

And in the anti-assignment and anti-anticipation provision relating to military retirement pay, 37 U.S.C. § 701, the Congress has foreclosed any argument that

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fn. 6/ cont'd

In commenting upon this 1968 change in the legislation, the Department of Defense noted that "One purpose of the amendment was to safeguard the participant's future retire pay when...a divorce occurs..." 1968 U.S. Code Cong. and Adm. News 3307. Further, the determination by Congress to exclude ex-wifes was done with the most deliberate care. In the passage of the law setting up this plan, provisions which would have protected ex-wives were stricken from the law before its passage. 118 Cong. Rec. S. 29810-12 (1972). In this respect Congress purposely excluded ex-wifes from benefiting under the plan. Cose v. Cose, 582 P.2d 1230, 1232 (1979).

Under the Armed Forces Survivor Benefit Plan the term "widow" is so defined in the Act at § 1447(3) to make clear that the Congress deliberately sought to exclude ex-spouses as a beneficiary entitled to participate in the annuity purchased by a retired member of the armed forces.

the divorced spouse may claim a portion of retirement pay.[7/]

The Hisquierdo court might well have pointed to the status of a community property spouse under the new Federal Bankruptcy Act, 11 U.S.C. §101 et seq., which entered into force only on October 1, 1979. There can be little doubt that a claim in bankruptcy under §523(a)(5) of the new Act, "Exceptions to Discharges", by a spouse for community property assets, places the claims and makes the claiming spouse an ordinary creditor. The new bankruptcy law does not treat the community property spouse as a co-owner.

7/ §701(c) states as follows:

"An enlisted member of...the Air Force may not assign his pay, and if he does so, the assignment is void."

(a) of §701 states as follows:

"Under regulations prescribed by the Secretary of...the Air Force a commissioned officer of the...Air Force may transfer or assign his pay account, when due and payable."

The phrase "when due and payable" in § 701(c) is the exact counterpart of the trust analogy in the Hisquierdo decision whereby the Supreme Court

fn. 7, cont'd

These numerous enactments do not manifest a federal policy of recognizing the claims of a non-military ex-spouse to military retirement pay. Rather these statutes suggest precisely the opposite: that military retirement pay is not divisible upon divorce.

4. THE COURT BELOW ERRED BY DIVIDING THE APPELLANT'S RETIREMENT PAY.

The Court of Appeal followed Fithian v. Fithian, 10 Cal.3d 592, 111 Cal.Rptr. 369, 517 P.2d 449, cert. denied, 419 U.S. 829 (1974), a pre-Hisquierdo decision of the Supreme Court, and found nothing

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fn.7/ cont'd

construed the phrase "shall not be anticipated" in § 231(m) of the Railroad Retirement Act to mean that "the interest of a...beneficiary shall not be paid...before a certain date." 439 U.S. at 588. The court continued to say "if that definition is applied here, then the offsetting award respondent seeks would improperly anticipate payment by allowing her to receive her interest before the date Congress has set for any interest to accrue." 439 U.S. at 589. This analogy to the law of trusts is especially apt with reference to the phrase "when due and payable".

There is in fact little or no difference between paragraph (c) and paragraph (a) of §701. Cf. United States v. Smith, 393 F.2d 318 (5th Cir. 1968).

in Hisquierdo to change its mind. Relying on the post-Hisquierdo decision of The California Supreme Court in In re Marriage of Milhan (Milhan II), 27 Cal.3d 765, 166 Cal.Rptr. 533, 613 P.2d 812 (1980), the Court of Appeal stated that in that case the Fithian reasoning was reiterated and unanimously approved, and therefore Appellant's proposition that Hisquierdo overruled Fithian was erroneous. (App. A, infra, at page 42 of the opinion.) The Court of Appeal did not allude to the fact that Milhan II was then, and still is, the subject of a pending petition for certiorari in this Court.

In addition to the similarity between the anti-assignment provision of the Railroad Retirment Act, 45 U.S.C. §231(m) and the anti-assignment provision governing military retirement pay, 37 U.S.C. §701, essential features of military retirement pay parallel those deemed significant for retired railroad workers.

There is nothing unique in the structure of the railroad retirement system which makes it appropriate to limit Hisquierdo to railroad retirement benefits and not to extend its rationale to military

retirement benefits. In neither case is the statutory scheme for retirement contractual; Congress is free to alter or even eliminate the retirement benefits. In both cases the benefits are correlated to the social security system. The 1975 and 1977 amendments to the Social Security Act, codified as 42 U.S.C. §§ 659(a) and 662(c), modify both § 231(m) of the Railroad Retirement Act and the anti-assignment provisions in the military retirement pay scheme, including 37 U.S.C. § 701.

Indeed, whereas the railroad retiree makes some contribution to his retirement program, the military retiree makes none; military retirement pay is funded entirely by mandatory tax receipts, and in that regard the military retirement program is all of a piece with the social welfare plan designed by Congress. It defies logic to perceive in these funding sources a basis for refusing to apply Hisquierdo to military retirement pay.

Further, in a private contractual system for retirement pay, it is understood that retirement pay is, at least in part, payment for past services rather than either a gratuity or payment for ongoing

services after retirement. By contrast, military retirment pay contains special features unlike any private retirement scheme.[8/]

Finally, Congress has expressed itself as fully in the military retirement pay area as it has in the Railroad Retirement Act context in rejecting the preservation of benefits for a divorced spouse. See 42 U.S.C. §§ 659(a), 662(c); 10 U.S.C. §§ 1434(c), 1447(3).

Cases which have applied Hisquierdo to military retirement pay correctly perceive that by its analysis and reasoning Hisquierdo bars the division of

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8/ A member of the military receiving retirement pay remains subject to being recalled into active service. 10 U.S.C. § 672(a)(1). In this regard military retirement pay represents, at least in part, compensation for remaining in a call up status. Further, a member of the military receiving retirement pay remains subject to the code of military justice. 10 U.S.C. § 802. In this regard as well, the retiree has not broken his relationship with his employer. Further, the military retiree may not take on employment with civilian agency of the United States without substantial financial detriment. See 5 U.S.C. § 5532(b).

military retirement pay pursuant to a divorce. Cose v. Cose, 592 P.2d 123 (Alaska 1979); Ex Parte Johnson, 591 S.W. 2d 453 (1979); Perez v. Perez, 587 S.W. 2d 671 (Tex.App. 1979).

CONCLUSION

For these reasons, the Court should note probable jurisdiction of this appeal, or in the alternative, treat this statement as a petition therefor and grant a writ of certiorari.

Respectfully submitted,

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_____
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A copy of this Jurisdictional Statement is to be served upon the Attorney General of California, as 28 U.S.C. § 2403(b) may apply to this appeal.

APPENDICES

APPENDIX A

[The Court's discussion of Hisquierdo v. Hisquierdo and the federal preemption issue appears on pages 41-42 of this appendix.]

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF

THE STATE OF CALIFORNIA

DIVISION TWO

FRANCIS P. WALL, Plaintiff and Appellant, v. JOHN KEVIN DONOVAN, Defendant and Respondent.	1 Civil 45618 (Super.Ct. No. 676268)

Husband (F.P.Wall) appeals from an order[1] granting a summary judgment to his former counsel (J.K. Donovan) in an action for malpractice in the marital dissolution proceedings. Husband argues that: 1) he was damaged by his lawyer's failure to

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[1] The notice of appeal erroneously designates the order as a judgment.

raise the domicile issue in the dissolution proceeding, which resulted in the erroneous distribution of one-half of his military pension to his former wife; and 2) the trial court erred in holding that he was collaterally estopped from raising the domicile issue in the malpractice action. For the reasons set forth below, we have concluded that the order must be affirmed.

The record reveals the following pertinent facts: On June 29, 1972, the wife filed a petition for legal separation. On September 5, 1972, husband filed a response requesting dissolution of the marriage. His response admitted that he had been a resident of this state for at least six months and that the wife's characterization of his vested Air Force retirement pension as community property was correct.

After a hearing, the stipulated interlocutory decree entered on December 15, 1972, included a division of the husband's Air Force pension as community property.[2]

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[2] Paragraph 4e so provided.

No appeal was taken from the interlocutory decree. After a hearing, the final decree entered on March 19, 1973, affirmed the division of community property. No appeal was taken. On April 10, 1973, Donovan withdrew as attorney of record in the dissolution proceedings pursuant to Code of Civil Procedure section 285.1.

On September 17, 1973, the husband (represented by his present counsel) filed a motion pursuant to Code of Civil Procedure section 473, to set aside the characterization and division of the community property, as set forth in the decree of dissolution, on grounds that he had never been a resident of California.

The court made findings of fact and conclusions of law. In doing so, the court weighed the conflicting declarations of the parties on the issue of the husband's domicile. The court noted that, prior to his petition for dissolution, the husband had obtained a California driver's license and had intended to remain in California because of the availability of programs for his educationally handicapped daughter; that after the separation the husband retired in

California, obtained employment in Novato, and remarried a California resident.[3]

The court then concluded that: 1) the motion was not timely filed as nine months had elapsed after entry of the interlocutory decree; 2) even if the husband were entitled to relief, there was no reasonable likelihood that he could prevail as at all times relevant he had been domiciled in California, and his Air Force pension benefits were properly characterized and divided as community property or quasi-community property; 3) even if the husband was not domiciled in California, he was estopped from contesting the issue of domicile as he originally failed to raise the issue in his response requesting dissolution, and he also had invoked the jurisdiction of the California court in the dissolution proceedings. The court entered its order denying the husband's motion on January 28, 1974. No appeal was taken from that

---

[3]Husband indicated that he did not register to vote in California, had not paid income tax, maintained bank accounts in Colorado and listed Florida as his home on permanent Air Force records.

order.

On June 17, 1974, the husband commenced the instant action against Donovan, his former attorney in the dissolution proceedings, alleging malpractice and negligent failure to raise the domicile issue at the time of the dissolution. Subsequently, Donovan filed a motion for summary judgment, alleging that there was no triable issue of fact, as the husband was domiciled in California at all times relevant and also was collaterally estopped from relitigating the issue.

Husband contends that collateral estoppel is not applicable here, as the issue of domicile in the dissolution proceeding was a broader one than in the instant case, and in any event, the issue of domicile was not necessary to the dissolution. As indicated above, the disputed factual question of the husband's domicile was initially determined in the uncontested dissolution proceedings and subsequently fully litigated in the contested proceedings on the husband's motion. The doctrine of collateral estoppel means that once an issue is litigated and determined, it is binding in a subsequent

action (Carroll v. Puritan Leasing Co., 77 Cal.App.3d 481, 490).

The husband's argument is based on the alternative findings made by the court in its findings and conclusions on his motion. Husband argues that the alternative findings are inconsistent as applied to the malpractice action. We see no inconsistency. Furthermore, the rule, as set forth in Restatement of the Law (1942) Judgments, section 68, comment n, at page 307, states: "Where the judgment is based upon the matters litigated as alternative grounds, the judgment is determinative on both grounds, although either alone would have been sufficient to support the judgment." This rule is followed in this state (Evans v. Horton, 115 Cal.App.2d 281; Bank of America v. McLaughlin etc. Co., 40 Cal.App.2d 620). In McLaughlin, this court, at page 628, noted that "If the questions involved in a suit are tried and decided, no matter how numerous they may be, the estoppel of the judgment will apply to each point so settled, in the same degree as if it were the sole issue in the case."

The rationale behind the rules quoted above is that if a party has an opportunity and motivation to fully litigate an issue, then he can anticipate the potential barring effect of an adverse judgment.

Here, as indicated above, the domicile issue was fully litigated and clearly necessary to the determination of both the dissolution and the husband's subsequent motion. In the instant case, where both parties have energetically litigated the issue of domicile, it was necessary for the trial court to rule upon the matter. Winters v. Lavine, 574 F.2d 46, noted at page 67: "[A]n alternative ground upon which a decision is based should be regarded as 'necessary' for purposes of determining whether the plaintiff is precluded by the principles of res judicata or collateral estoppel from relitigating in a subsequent lawsuit any of those alternative grounds."

Next,the husband points out that the issue of federal preemption as to military pensions was not settled at the time of the dissolution in 1972. However, since Frence v. French, 17 Cal.2d 775, the courts of this state uniformly held

that vested military pensions were community property. In re Marriage of Brown, 15 Cal.3d 838, eliminated the distinction made by French between vested and nonvested pensions (Henn v. Henn, 26 Cal.3d 323, fn.2 at p. 328). Although there may have been some room for a preemption argument as to nonvested pensions in 1971 and 1972 (see Smith v. Lewis, 13 Cal.3d 349, 357), the matter was laid to rest in 1974. In In re Marriage of Fithian, 10 Cal.3d 592, the court held at page 604: "Congress' purpose in creating the retirement pay system was to enhance the morale of the serviceman and to encourage him to remain in the military....The conclusion is inescapable that retirement pay is awarded in return for services previously rendered and therefore is divisible as community property. ..." The court concluded that Congress had not preempted the application of California community property law to federal military pensions.

The husband also argues about the retroactive effect of Fithian, supra, 10 Cal.3d 592. As indicated above, the argument is not relevant as to the

status of his vested pension which has been settled since French v. French, supra, 17 Cal.2d 775. Furthermore, retroactivity of Fithian is significant only as to non-vested pensions. Husband urges[4] that the reasoning in In re Marriage of Brown, supra, 15 Cal.3d, pages 850-851, also applies to his vested military pensions. Brown, however, clearly indicated that its rationale was not applicable to vested pensions, as the court stated at page 850. "if we accord complete retroactivity to our decision today we might reopen controversies long settled by final judgment. Undoubtedly in the last 35 years since the rendition of French v. French, counsel, relying on that decision, have often failed to list nonvested pension rights as among the community assets of the marriage. In some cases the inability of the nonemployee spouse to assert an interest in nonvested pension rights may have induced the court to award additional alimony."

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[4]Husband's brief relied on Raudebaugh v. Young, formerly 87 Cal.App.3d 364, and since decertified.

More recently, our Supreme Court reiterated the rule that military retirement pensions are community property, and that Fithian, supra, 10 Cal.3d 592, applies retroactively. In Henn v. Henn, supra, 26 Cal.3d, the court held at page 329: "Fithian did not overturn a settled rule of law. Neither this court nor any California Court of Appeal had ever held that the supremacy clause of the United States Constitution precluded the division of federal military retirement pay as community property under state law. (See Fithian, supra, 10 Cal.3d at pp. 596-597.) Since it was never the law that the supremacy clause requires federal military retirement pay to be excepted from treatment as community property under the California Civil Code, it would be anomalous for this court to now establish this erroneous proposition as to the rule governing pensions accruing prior to Fithian. To do so would deprive individuals of their valid rights under California law." Again, within the last few months, our Supreme Court unanimously approved, and reiterated its prior reasoning, in

In re Marriage of Milhan, 27 Cal.3d 765, 775-776.[5]

Finally, the husband argues that the doctrine of collateral estoppel should not have been applied for equitable reasons. He relies on Restatement of the Law, supra, Judgments, section 70; Lewis v. Superior Court, 77 Cal.App.3d 844; Bridges v. Bridges, 82 Cal.App.3d 976; and Sangiolo v. Sangiolo, 87 Cal.App.3d 511. The case at bar, however, is not analogous to Lewis, Bridges or Sangiolo. In Lewis, a non-employee spouse, who was totally dependent upon her husband, was deprived of a share of pension because both parties failed to include the pension in the property settlement agreement. The court invoked the injustice exception to hold that the husband should not benefit to the wife's

---

[5] In a supplemental memorandum filed pursuant to the parties' stipulation waiving oral argument, the husband attempted to rely on an unpublished opinion of this court (Division Four) in which the U.S. Supreme Court subsequently granted certiorari but then postponed jurisdiction pending the hearing on the merits (In re Marriage of McCarty, 1 Civil No. 45056, jurisdiction postponed by an order of the U.S. Supreme Court dated October 20, 1980). In any event, McCarty is not apposite here, as it did not involve a conflict

detriment under such circumstances. The equitable exception was similarly applied in Bridges and Sangiolo, where the pension had not been included in the community property divided at the time of dissolution. No similar equities are present here. Both parties agreed at the time of dissolution that the husband's vested pension rights were community property. As our Supreme Court explained in Henn v. Henn

---

between state and federal law as to the husband's military pension. The husband also cited Cose v. Cose 592 P.2d 1230, in which the Alaska Supreme Court held that the federal supremacy clause prohibits application of state property settlement concepts on divorce to military retirement pay on grounds of congressional intent, and Hisquierdo v. Hisquierdo (1971) 439 U.S. 572. Hisquierdo, however, resolved a conflict between California community property law and federal law as to a non-military pension. Hisquierdo does not overrule Fithian, supra, as the controlling authority relating to military retirement benefits (Gorman v. Gorman, 90 Cal.App.3d 454, 460-462). We have granted Donovan's motion to strike points II and III of the husband's reply to Donovan's supplemental memorandum.

supra, 26 Cal.3d 323, at page 330, under California law, a spouse's entitlement to a share of the community property arises at the time that the property is acquired, and is not altered except by judicial decree or on agreement of the parties. Here, the decree of dissolution and the subsequent determination of the husband's motion settled the status of the husband's vested military pension. Neither was appealed and both were final prior to the initiation of the instant action.

The order appealed from is affirmed.

CERTIFIED FOR PUBLICATION.

Taylor, P.J.

WE CONCUR:

Rouse, J.

Miller, J.

APPENDIX B

F I L E D
Jan - 9 1981
Court of Appeal
First App. Dist.
by Clifford C. Porter, Clerk

COURT OF APPEAL OF
THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

FRANCIS P. WALL, Plaintiff and Appellant,	)	
vs.	)	No. 45618
JOHN KEVIN DONOVAN, Defendant and Respondent	)	

BY THE COURT:

The petition for rehearing is denied.

Dated Jan - 9 1981

Rouse, J. acting P.J.

APPENDIX C

CLERK'S OFFICE, SUPREME COURT
4250 State Building
San Francisco, California 94102

FEB 5 1981

I have this day filed Order

HEARING DENIED

In re: 1 Civ. No. 45618

Wall

VS.

Donovan

Respectfully,

Clerk

APPENDIX D

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LAW OFFICES OF STEPHEN ADAMS
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(415) 421-1300

F I L E D
Mar - 6 1981
Court of Appeal
First App. Dist.
CLIFFORD C. PORTER
Clerk

Attorneys for Plaintiff
and Appellant

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION TWO

FRANCIS P. WALL,

Plaintiff & Appellant,

vs.

JOHN KEVIN DONOVAN,

Defendant & Respondent.

1 Civil No.
45618

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that FRANCIS P. WALL, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeal of the State of California, First Appellate District, Division Two, entered in this action on December 11, 1980, which affirmed the superior court's order granting summary judgment in an

an action for malpractice in marital dissolution proceedings. Said court denied petition for rehearing on January 9, 1981.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: March 5, 1980.

LAW OFFICES OF STEPHEN ADAMS

By_____
Stephen Adams
Attorney for
Francis P. Wall

PROOF OF SERVICE BY MAIL

I am a citizen of the United States over the age of 18 years. I declare I am employed in the City and County of San Francisco, California, and my business address is 706 Sansome St., San Francisco, California, I am a member of the bar of the Supreme Court of the United States.

On March 5, 1981, I served the within "Notice of Appeal to the Supreme Court of the United States" by placing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid in the United States mail at San Francisco, California to the parties listed below. I further certify that all parties required to be served have been served.

Clerk, Superior Court of California (Hon.Ira Brown) City & County of San Francisco
City Hall
San Francisco, California 94102

John B. Marchant
Sedgwick, Detert, Moran & Arnold
Attorneys at Law
111 Pine Street, 11th Floor
San Francisco, California 94111

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on March 5, 1981

Stephen Adams

APPENDIX E

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article VI, clause 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Code, Title 10:

> § 672. Reserve components generally
>
> (a) In time of war or of national emergency declared by Congress, or when otherwise authorized by law, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, of a reserve component under the jurisdiction of that Secretary to active duty (other than for training) for the duration of the war or emergency and for six months thereafter. However--
>
> (1) a member on an inactive status list or in a retired status may not be ordered to active duty under this subsection unless the Secretary concerned, with the approval of the Secretary of Defense in the case of the Secretary

of a military department, determines that there are not enough qualified Rserves in an active status or in the inactive National Guard in the required category who are readily available. ...

§ 8929. Computation of retired pay: law applicable

A member of the Air Force retired under this chapter is entitled to retired pay computed under chapter 871 of this title.

§ 8991. Computation of retired pay

The monthly retired pay of a person entitled thereto under this subtitle is computed according to the following table. For each case covered by a section of this title named in the column headed "For section", retired pay is computed by taking, in order, the steps prescribed opposite it in columns 1, 2, 3, and 4, as modified by the applicable footnotes. However, if a person would otherwise be entitled to retired pay computed under more than one pay formula of this table or the table in section 1401 of this title, he is entitled to be paid under the applicable formula that is most favorable to him. Section references below are to sections of this title.

United States Code, Title 11:

§ 523. Exceptions to discharge

(a) A discharge under section 727, 1141, or 1328(b) of this title does

not discharge an individual debtor from any debt--

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree, or property settlement agreement, but not to the extent that--

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise; or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

United States Code, Title 42:

§ 659. Enforcement of individual's legal obligations to provide child support or make alimony payments

(a) United States and District of Columbia to be subject to legal process

Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia

(including any agency, subdivision, or instrumentality thereof) to an individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

§ 662. Definitions

For purposes of section 659 of this title--

(c) The term "alimony", when used in reference to the legal obligations of an individual to provide the same, means periodic payments of funds for the support and maintenance of the spouse (or former spouse) of such individual, and (subject to and in accordance with State law) includes but is not limited to, separate maintenance, alimony pendente lite, maintenance, and spousal support; such term also includes attorney's fees, interest, and court costs when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable State law by a court of competent jurisdiction. Such term does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses.

§ 4803. Quasi-community property

As used in this part, "quasi-community property" means all real or personal property, wherever situated, heretofore or hereafter acquired in any of the following ways:

(a) By either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition.

(b) In exchange for real or personal property, wherever situated, which would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition.

APPENDIX F

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Clerk
By Sue Walker
Deputy

ENTERED
Book A599,p.8
Oct 14 1977
CARL M. OLSEN
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By A. Gentle
Deputy

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

FRANCIS P. WALL,

Plaintiff,

vs.

JOHN KEVIN DONOVAN,

Defendant.

No. 676,268

SUMMARY JUDGMENT

Pursuant to the Order of the Court this day granting Defendant's Motion made pursuant to Section 437(c) of the Code of Civil Procedures,

IT IS ORDERED, ADJUDGED AND DECREED that the Complaint be and it is hereby dismissed and that Defendant, JOHN KEVIN DONOVAN, recover his costs in the sum of $_____.

DATED: Oct 12-77, 1977.

/s/
JUDGE OF THE SUPERIOR COURT

APR 27 1981

No. 80-1628

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

FRANCIS P. WALL
Appellant,

vs.

JOHN KEVIN DONOVAN,
Appellee.

On Appeal from the Court of Appeal of California First Appellate District, Division Two

MOTION TO DISMISS

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No. 80-1628

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

FRANCIS P. WALL
Appellant,

VS.

JOHN KEVIN DONOVAN,
Appellee.

On Appeal from the Court of Appeal of California First Appellate District, Division Two

MOTION TO DISMISS

Appellee, John Kevin Donovan, moves the Court to dismiss the appeal of Appellant, Francis P. Wall, on the grounds that the federal question sought to be reviewed was not properly raised or expressly passed on and that the judgment rests on an adequate non-federal basis. Rule 16(b).

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

Appellant contends that, when applied to federal military retirement pay, California Civil Code Section 4803, which defines "quasi-community property", is repugnant

to the supremacy clause of the United States Constitution, Article VI, Clause 2 and those laws of the United States cited in Appendix E to Appellant's Jurisdictional Statement.

In this lawyer's malpractice case, Appellant alleged that Appellee, his attorney in an underlying domestic relations case, breached the duty of care required of a California lawyer in advising him to agree to share his federal military retirement pay with his wife. Appellant claimed that a careful California lawyer would have counseled him to challenge the jurisdiction of the California domestic relations court over his federal military retirement pay on the grounds that (1) Appellant was not a California resident; and (2) federal law preempted state jurisdiction over federal military retirement pay in domestic relations cases.

Appellee moved for summary judgment on the grounds that (1) Appellant was collaterally estopped to relitigate the issue of his residence by the findings of the domestic relations court that he was a resident of California; and (2) the decision of the California Supreme Court in *Fithian v. Fithian* (1974) 10 Cal.3d 592, 111 Cal.Rptr. 369, 517 P.2d 449, *cert. denied* 419 U.S. 829:

> "Husband specifically challenges the trial court's characterization of a portion of his federal military retirement pay as community property, contending such a determination is forbidden to the states by the supremacy clause (art. VI, cl. 2) of the United States Constitution. *We conclude federal military retirement pay is properly the subject of California community property law and therefore affirm the judgment.*"

10 Cal.3d 595. (Emphasis added)

The trial court granted Appellee's motion for summary judgment and the California Court of Appeal affirmed (see Appendix A to Appellant's Jurisdictional Statement).

ARGUMENT

It is not enough to invoke the Court's obligatory jurisdiction under Section 1257 that a state statute was involved in the state court proceedings. The validity of the statute, either on its face or as applied in a particular case, must have been drawn in question and ruled upon. *Garrity v. New Jersey* (1967) 385 U.S. 493, 495-496, 87 S.Ct. 616, 17 L.Ed.2d 562; *Cardinale v. Louisiana* (1969) 394 U.S. 437, 439, 89 S.Ct. 1161, 22 L.Ed.2d 398; *Wilson v. Cook* (1946) 327 U.S. 474, 480, 66 S.Ct. 663, 90 L.Ed. 793.

The issue before the California trial court and the California Court of Appeal below was not whether Civil Code Section 4803, when applied to military retirement pay, was repugnant to the supremacy clause of the United States Constitution. Rather the issue was whether Appellee committed actionable malpractice under California law in failing to make such claim on behalf of Appellant in the underlying domestic relations case.

> "One who establishes malpractice on the part of his attorney in prosecuting or defending a lawsuit must also prove that careful management of it would have resulted in recovery of a favorable judgment and collection of the same, or in case of a defense, that proper handling would have resulted in a judgment for the client; that there is no damage in the absence of these latter elements, and the burden of proof rests

> upon the plaintiff to prove recoverability and collectability of a plaintiff's claim or ability to establish a defense for the client who has been sued."

Campbell v. Magana (1960) 184 Cal.App.2d 751, 754, 8 Cal.Rptr. 32.

Appellant was unable to sustain his burden to show damage for Appellee's failure to raise federal pre-emption because of the decisions of the California Supreme Court in *Fithian* (supra) and *In re Marriage of Milhan* (1980) 27 Cal.3d 765, 166 Cal.Rptr. 533, 613 P.2d 812 which both expressly rejected the federal pre-emption argument.

Appellant therefore seeks to sustain his burden to show damage by asking this Court to speculate that, had Appellee raised the federal pre-emption argument in the domestic relations proceeding and, after appealing the underlying case to the highest state court, had prevailed upon the Court to review this question, the Court would have overruled *Fithian* and *Milhan*.

If the Court were to advise Appellant what it would have done under this hypothetical set of facts, in order to affirm or reverse the California Court of Appeal, the Court would then have to consider, given its hypothetical ruling in the domestic relations case, whether Appellant has a viable claim for legal malpractice under California law.

Whether Appellant has established a claim for legal malpractice under California law is a non-federal question. Where a state court decides only non-federal questions the Court has no jurisdiction to review such decisions.

Herb v. Pitcairn (1954) 324 U.S. 117, 125, 65 S.Ct. 459, 89 L.Ed. 789; *New York Times v. Jascalevich* (1978) 439 U.S. 1317, 1318, 99 S.Ct. 6, 58 L.Ed.2d 25.

For the foregoing reasons the appeal should be dismissed.

Respectfully submitted,

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